

THE PUBLIC ENQUIRIES ACT

SUBMISSIONS OF THE CORPORATION OF THE CITY OF TORONTO
TO THE HONOURABLE G. A. MCGILLIVRAY, A JUSTICE OF
APPEAL OF THE SUPREME COURT OF ONTARIO, ACTING AS A
COMMISSIONER RESPECTING THE WORKMEN'S COMPENSATION ACT

The Corporation of the City of Toronto is, save for the matters hereinafter mentioned, content with the position of the City as an employer under Schedule 2 of the Act, individually liable to pay compensation. The City of Toronto feels, however, as it did when a similar enquiry was conducted by The Honourable Mr. Justice Roach in 1949-50, that appropriate amendments should be made to The Workmen's Compensation Act to clarify the position of workmen and employers under Schedule 2 in the field of Third Party liability.

1. When an employee to whom the Act applies sustains an injury arising out of and in the course of his employment, which would entitle him or his dependants to relief against some person other than his employer, he may choose to treat the matter entirely as a private one and claim nothing under the Act or he may claim compensation under the Act. Section 9(2) of the Act provides that if the workman enforces his own rights and recovers less than the compensation to which he would have been entitled, he may then claim the difference. Section 9(2) should be amended to clarify whether it applies to settlements before judgment.



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Throughout the Act, the word "compensation" is used with special reference to the money which is paid to the workman in lieu of his wages, but it should be noted that the workman is also entitled to medical aid under Section 51. The Act makes it quite clear that compensation and medical aid are two different things, as for example, in Section 5 of the Act. It would appear to be the unintentional result that a workman can enforce his own rights and also receive medical aid under the Statute. It is, therefore, submitted that:-

- (a) Section 9(1) should be amended to read as follows:

"Where an accident arising out of and in the course of his employment happens to a workman under such circumstances as entitle him or his dependants to an action against some person other than his employer, the workman and his dependants, if entitled to benefits under this part may claim such benefits or may bring such action."

- (b) Section 51, Subsection 1 should be changed to read in its first part as follows:

"Every workman entitled to and claiming benefits under this part...."

and thereafter as in the section contained.

2. Where a municipal employee is injured under circumstances which may possibly involve liability of a third person, the present provisions of the Act with respect to election are not entirely satisfactory to this municipality. In many cases, election has been postponed pending negotiations by the workman with the third party or his insurers, and in the intervening period, the municipality is not usually a party to such negotiations. It would appear that the scheme of election under the Act, while possibly suited to industries under Schedule 1 of the Act, should be revised with respect to industries under Schedule 2, to provide that a workman thereunder shall elect not to claim benefits under the Act within three months or such further time as the Board may allow, failing which he shall be presumed to have elected to claim such benefits. In addition, the Act should be amended to invalidate settlements made by the workman before he has elected not to claim benefits under the Act. Further, where the workman has elected not to claim benefits under the Act and proposes to enter into any settlement with a third party, that settlement, it is submitted, should be approved by The Workmen's Compensation Board so that the Board may be satisfied that the settlement is in the best interests of the workman or his dependants in the event of a claim under Section 9(2). Where a workman elects not to

claim benefits under the Act, the Act should be amended to bar any claim to benefits under the Act for injuries or damages which were not apparent or reasonably foreseeable at the time of the election.

3. Paragraphs 1 and 2 have dealt with suggested changes in the Act to deal with difficulties which arise where the workman sues in his own name to secure his rights against the third party. The principal submissions of the City, however, deal with the situation where the City, as a Schedule 2 employer, individually liable to pay compensation and other benefits, brings an action pursuant to the provisions of Section 9(3) of the Act. For convenience, this section is set out hereunder:

"If the workman or his dependants elect to claim compensation under this Part, the employer, if he is individually liable to pay it, and the Board, if the compensation is payable out of the accident fund, are subrogated to the rights of the workman or his dependants, and may maintain an action in his or their names or in the name of the Board against the person against whom the action lies, and any sum recovered from him by the Board shall form part of the accident fund."

It is to be observed that as the section now reads, the Workmen's Compensation Board may bring an action in its name if the compensation is payable out of the accident fund, but a Schedule 2 employer is

given only the statutory right to bring an action in the name of the workman or his dependants.

In the City's view, it is not important that Schedule 2 employers be given the right to bring an action in the name of the employer, but it is important that the Statute make quite clear, by appropriate amendments, that all payments to or on behalf of the workman or his dependants made by the employer are recoverable in such an action. It has been argued that a Schedule 2 employer, in bringing an action under Section 9(3) can only stand in the place of the workman and can merely enforce his rights. If this is so, then it can be argued that only the items of loss suffered by the workman can be recovered. If the workman has not been put to any medical expense and has not lost wages because his employer has paid medical aid and compensation, then, so the argument runs, the workman has not suffered damages to the extent of such payments.

The Workmen's Compensation Act was never intended to free a tortfeasor from any of the damages which he would have been liable to pay but for the Act. Section 9(3) of the Act was intended for the benefit of the employer or the Board and should not operate to excuse a tortfeasor from part of his liability.

It is therefore submitted as a recommendation to your Commission that the Act be amended to give a Schedule 2 employer a definite statutory right to claim from the tortfeasor in a subrogated action all payments made to or on behalf of the workman or his dependants, plus administration expenses paid under Section 119 of the Act by the employer.

4. In the City's view, it is desirable that the Statute make it clear that the employer is entitled to bring an action in the name of the workman for all of the benefits provided by the employer, rather than attempting to achieve such a result by permitting the employer to sue in his own name. A jury would be influenced in some cases by the presence of the employer as a party plaintiff, particularly in the case of a corporation as large as the City of Toronto. Indeed, it is further submitted that actions brought by Schedule 2 employers in the name of the workman, should be tried without a jury. It is rare that a jury will not be aware that the real plaintiff is the employer and not the workman who has already been compensated. In view of the type of employer coming within Schedule 2, a real danger exists that the intention of the Legislature, expressed in Section 9(3) of the Act, will be frustrated. Actions arising out of non-repair of a

highway are now tried without a jury and juries are dispensed with where mention of insurance is made. Juries should not be put in a position where they may be influenced improperly by extraneous matters.

5. It is submitted that the Act should be amended by adding a statutory provision that any damages in excess of all monies paid out by a Schedule 2 employer in respect of the accident, recovered by the employer in any action brought by him under Section 9(3), less a proper allowance for legal expenses and workmen's compensation administrative expenses, shall be paid over to the workman, provided that such payment shall stand as a credit against any further claims by the workman for the same injury or disability.

In a small percentage of cases, the employer recovers a much larger amount than he has paid out, by reason of the fact that a substantial amount is awarded as general damages. In the City of Toronto, the surplus is given to the workman, and a by-law has been passed to this effect. It is felt that the employer should not profit as a result of any injury to an individual employee. The Legislature has already permitted the City of Toronto to follow this policy of paying any surplus to the workman by enacting private legislation --

The City of Toronto Act (2), 1946 C.142, S.6.

6. In the alternative, the legislature could, it is submitted, provide that an agreement between the employer and the workman that in consideration of payment over to the workman of such excess monies, the said excess monies are to stand as a credit against any further claims by the workman for the same injury or disability, is valid, notwithstanding the provisions of S.18 of the Act.

7. It is submitted that it would be useful and beneficial that the legislation be amended to provide that, in subrogated actions brought by Schedule 2 employers, a list of Workmen's Compensation Awards and medical aid payments which have been authorized by the Board, certified by a proper officer of the Board, shall be prima facie evidence that the workman has incurred such expenses in respect of any given accident.

8. Section 52 of the Act provides that every physician, surgeon, hospital official or other person, attending, consulted respecting, or having the care of, any workman, shall furnish to the Board, from time to time, without additional charge, such reports as may be required by the Board in respect of such workman. Some difficulty has been encountered in actions brought

by the City in the name of a workman in obtaining proper medical reports. It is suggested that S.52 be amended to make such section applicable to employers individually liable to pay compensation who are subrogated to the rights of a workman under S.9(3) of the Act.

9. It is submitted that a new provision should be inserted in the Act to the effect that any workman in receipt of benefits under the Act be required to render such reasonable assistance as may be required by an employer subrogated to the rights of the workman under S.9(3) of the Act, with the proviso that the workman should not be put to any expense by reason of such assistance.

All of which is respectfully
submitted.

DATED at Toronto, Ontario, this 8th day of
September, A.D. 1966.

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TO: The Honourable
Mr. Justice McGillivray,
Commissioner.

